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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-312

GEORGE EDWARD SMITH, JR.,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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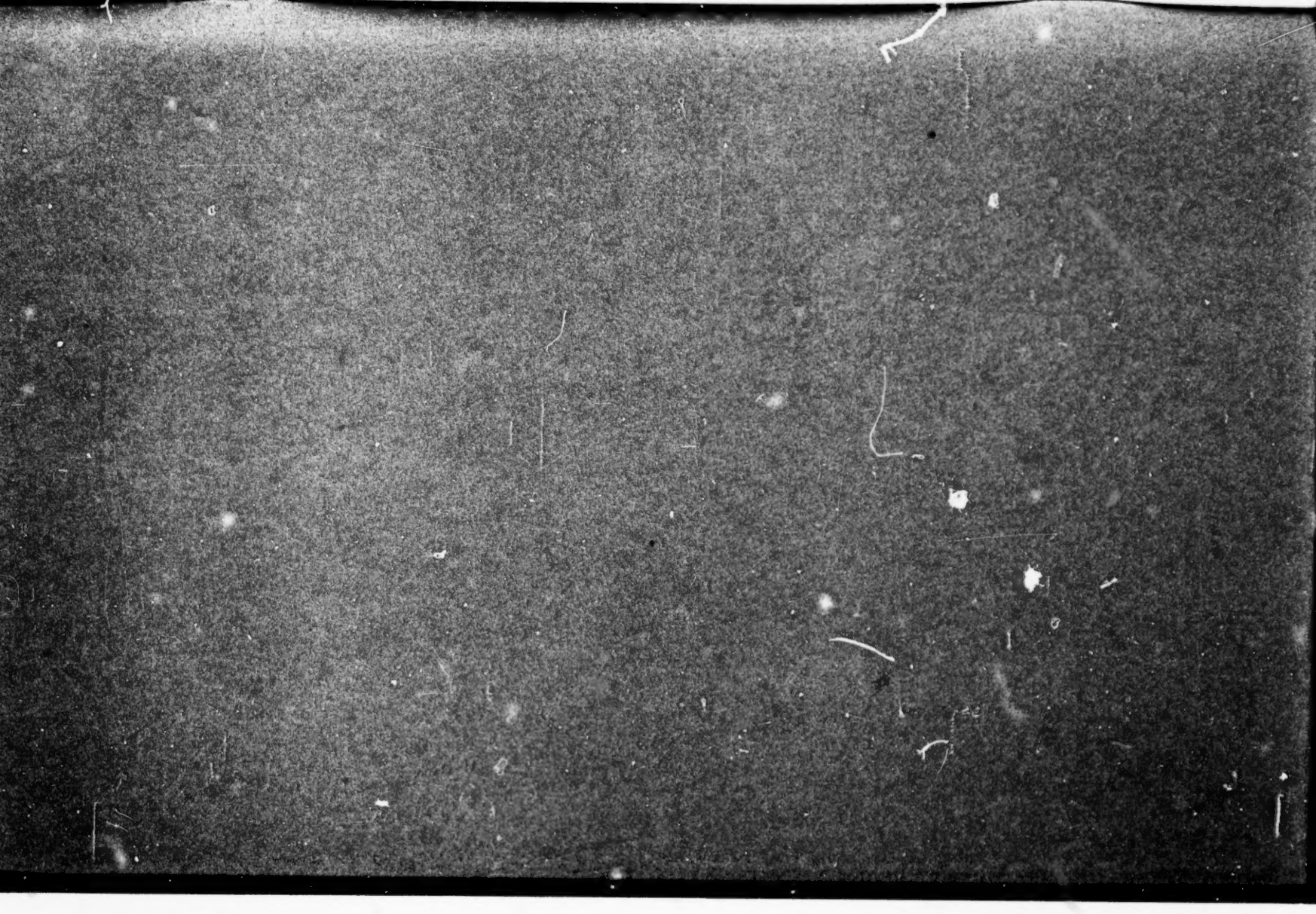

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JURISDICTION

The petitioner raised no federal question, substantial or otherwise, either in the trial court or in the Wisconsin Supreme Court. Such questions are raised for the first time in the petition for writ of certiorari, which the Court cannot now consider. *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.ed. 2d 398 (1969).

STATEMENT OF THE CASE

At page 5 of the petition, the place of the alleged commission of the offense and petitioner's name are omitted from the statement of Count Two of the complaint. The count properly is:

> "That on the 5th day of March, 1969, at the City of Janesville, in said County of Rock and State of Wisconsin, the said George Edward Smith, Jr., did unlawfully," etc.

ARGUMENT

All questions argued in the petition are neither of sufficient importance, founded upon a conflicting decision, affect others than the petitioner, nor based on incorrectness of the decision below. They are raised for the first time in the petition for the writ of certiorari, as above noted.

Petitioner apparently relies upon the Fourth Amendment in his assertion that the state must have shown probable cause in the complaint and that it failed to do so. But the amendment, in its pertinent part, states that ". . . no Warrants shall issue, but upon probable cause. . . ." No warrant was ever issued in the case because the petitioner, after a valid, warrantless arrest, appeared voluntarily before the magistrate, with counsel. No warrant was therefore required. *Pillsbury v. State*, 31 Wis. 2d 87, 142 N.W. 2d 187 (1966). No question of importance is presented in that regard.

The petitioner urges that he was denied due process because the decision below was contrary to the "concession" of the state that Count Two of the complaint would be insufficient if Count One were held fatally defective. With equal reason one might claim such denial in any case of reversal of a judgment

in his favor, or one entered upon an agreed fact statement. The court below was not foreclosed by a legal conclusion of the "conceding" party. Again, no important question is advanced, and the decision below is correct.

CONCLUSION

For the above reasons, the petition for the writ should be denied.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

ROBERT D. MARTINSON
Assistant Attorney General

Counsel for Respondent.

November 22, 1971

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CERTIFICATE OF SERVICE

I hereby certify that on November 22, 1971, three copies of the foregoing Brief of Respondent were mailed, postage prepaid, to George E. Smith, Jr., Esq., 200 South Main Street, Janesville, Wisconsin 53545, counsel for the petitioner. I further certify that all parties required to be served have been served.

ROBERT D MARTINSON
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Department of Justice
State Capitol
Madison, Wisconsin 53702

Counsel for Respondent.